

1997

Allocation of Sender Risks in Wire Transfers: The Common Law and UCC Article 4A [Part 1]

Benjamin Geva

Osgoode Hall Law School of York University, bgeva@osgoode.yorku.ca

Source Publication:

TSAR (Journal of South African Law). 1997, Volume 1 (1997), p. 15-28.

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/scholarly_works



Part of the [Banking and Finance Law Commons](#)



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Recommended Citation

Geva, Benjamin. "Allocation of Sender Risks in Wire Transfers: The Common Law and UCC Article 4A (Part 1)." *TSAR (Journal of South African Law)* 1997.1 (1997): 15-28.

This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

Allocation of sender risks in wire transfers— the Common law and UCC Article 4A*

BENJAMIN GEVA**

I *The wire transfer*¹

In a credit transfer the payor's instructions are communicated to the payor's bank directly by the payor, without the intermediation of a credit to the payee's account at the payee's bank. When the instructions are thus communicated, the payor's account is debited. As such, in a credit transfer, unlike in a debit transfer (or in the cheque collection process), the first impact of the payor's instructions on the banking system is a debit to the payor's account with the payor's bank. Having received the payor's instructions and debited the payor's account, the payor's bank forwards the instructions to the payee's bank which then proceeds to credit the payee's account. Thus, in a credit transfer, the debit to the payor's account precedes the credit to the payee's account, and is not subject to reversal, *eg* for lack of funds. In a credit transfer, funds debited to the payor's account are "pushed" to that of the payee.

In a credit transfer, the payor is called the originator and the payee is the beneficiary. Accordingly, the payor's bank is the originator's bank and the payee's bank is the beneficiary's bank. Any other bank participating in the transaction is an intermediary bank. Payment instructions are the subject matter of a "payment order". Each payment order is transmitted by a sender to a receiving bank.

A credit transfer is initiated by the issue of a payment order by the originator to the originator's bank. The transaction is ultimately carried out by debiting the originator's account at the originator's bank and crediting the beneficiary's account at the beneficiary's bank. Where these are separate banks, the originator's bank executes the originator's payment order by issuing its own payment order, either to the beneficiary's bank or to an intermediary's bank. An intermediary bank will issue its own payment order either to the beneficiary's bank or to another intermediary bank, that will do the same, until a final payment order is issued to the beneficiary's bank. Each interbank payment order must be paid by the sender to the receiving bank. Interbank communication thus corresponds to the interbank payment or settlement facilities; namely, each bank will issue a payment order only to a receiving bank with which such settlement facilities are available. Typically, such facilities are either bilateral, in the form of a correspondent account, that is, an account one bank has with the other, or multilateral, in the form of accounts several banks hold with a central counterpart, which could be the central bank.

* This paper draws heavily (particularly so far as UCC Article 4A is concerned) on my book, *The Law of Electronic Funds Transfer* (1992-95).

** Professor of Law, Osgoode Hall Law School, York University (Toronto) Canada.

¹ See Geva "International funds transfers: mechanisms and laws" in Norton, Reed and Walden (eds) *Cross Border Electronic Banking: Challenges and Opportunities* (1995).

Accordingly, a credit transfer may be either in-house or out-house. The latter are either correspondent or complex. Where the originator's and the beneficiary's accounts are in the same bank the transaction is in-house. No interbank payment order is required to execute the originator's payment order. Where the originator's and the beneficiary's accounts are in different banks, which are correspondents, meaning one of them has an account with the other, the transaction is a correspondent transfer, which requires an interbank payment order between the two correspondent banks. Payment of the payment order is then carried out at this account.

Otherwise, the transaction requires the participation of intermediary banks and is classified as a complex transfer. In its simplest pattern, a common correspondent, that is, a third bank having bilateral correspondent relationships with the originator's and beneficiary's banks, will intermediate between them. One or more intermediary banks may be required in the absence of such a common correspondent. In its most sophisticated pattern, a complex transfer will involve a clearing-house facilitating multilateral interbank communication and settlement on the books of a central counterpart, with whom they all hold accounts, such as a central bank. For each country or currency, the domestic Large Value Transfer System ("LVTS") linking all major banks is such a facility.

In a credit transfer, each payment order, whether from the originator to the originator's bank or from one bank to another, can be given in writing, orally or by electronic means. A payment order is given electronically whenever it is embodied in a cable or a telex ("wire"), initiated through a magnetic tape or diskette that may physically be delivered, or sent from a terminal over a dedicated communication network. Communication by wire or over a dedicated network is "on-line"; when transmission immediately follows input it is also in "real-time". An electronic funds transfer ("EFT") occurs whenever a payment order is given by any electronic means.

The segment of the domestic payment system for the exchange and settlement of large value credit transfers is referred to as Large Value Transfer System ("LVTS"). In major currency countries local LVTS utilize communication networks for the transmission of interbank payment orders. In the past, overseas/cross border interbank communication was either by air letter or by means of cable or telex ("wire"); the large value credit transfer has thus been called in fact, to this day, a "wire transfer". However, in overseas/cross border interbank communication the wire has increasingly lost ground to the dedicated communication network of SWIFT.

Today, all major currency countries have computerized (or automated) facilities for the exchange of messages. As well, they either have adopted or are moving towards the adoption of special settlement arrangements for large value credit transfers.

A technologically advanced LVTS (or "wire transfers system") is characterized by a communication system linking participating banks by means of dedicated lines capable of providing on-line communication in real-time. According to Stone,² "[t]he virtually instantaneous transfer of payment data by a two-way telephone-line communication network shapes the prominent economic operations characteristics" of a LVTS. These character-

² Stone "Electronic payment basics" 1986 *Ec Rev Fed Res Bank of Atlanta* 3 9-10.

istics are “speed, single transaction focus and . . . security”, facilitating a relatively expensive individualized handling, confirmation and notification for each payment.

LVTS settlement usually takes place on the books of a central counterpart where all direct participants held accounts. Typically, and in all major currency countries, this central counterpart is the central bank.

As a rule, settlement is conducted either on a net-net (multilateral net) or gross basis. In the former, settlement occurs only periodically, usually daily, at the end of each clearing cycle, for the payment orders exchanged during the clearing period. In the latter, settlement for each payment occurs on a real-time basis, as each individual order is communicated and processed.

This means that in a net net settlement system, payment orders are exchanged among participating banks during a clearing cycle, usually one day. At the end of the cycle, multilateral (often preceded by bilateral) netting takes place, sometime at the conclusion of an accounting process which has taken place throughout the entire daily exchange. Balances are then adjusted on the books of the central bank, usually shortly after the end of the day operations, by means of credit transfers from net net debtor banks to net net creditor banks. Conversely, in a gross settlement system, each transfer is settled individually on the books of the central bank as it is communicated to the receiving bank.

II *Legal fundamentals*

(i) The common law

(a) Characterization and chain of liability

It is universally accepted under the common law that “there is no express or implied trust in favour of the [beneficiary] resulting from the [originator’s] bank accepting instructions to make a credit transfer”.³ Assuming the originator’s payment order to be like a cheque, a mandate, and taking into account the express statutory rejection of the assignment theory as to bills of exchange and cheques,⁴ Pennington, Hudson and Mann maintain that “it seems likely that by analogy the acceptance of the [payment order] by the [originator’s] bank similarly does not constitute an assignment of funds”. Nonetheless, they further acknowledge that “since the Bills of Exchange Act . . . only applies to bills and cheques, the argument is by no means conclusive and a deeper analysis is desirable”.⁵

English law distinguishes between legal and equitable assignment. The former must be absolute, in writing, and perfected by the assignee’s notice to the debtor.⁶ In a credit transfer, whether the assignee is the beneficiary or his bank, no such notice is usually given to the debtor (namely the originator’s

³ Pennington, Hudson and Mann *Commercial Banking Law* (1978) 285.

⁴ See s 53(1) of the Bills of Exchange Act 1882 (UK), corresponding eg to s 126 of the Canadian Bills of Exchange Act, RSC 1985, C B-4 and s 51 of South African Bills of Exchange Act 34 of 1964.

⁵ (n 3) 285.

⁶ See eg *ibid*. The standard provision is s 136(1) of the Law of Property Act 1925 (UK), on which similar provisions are modelled throughout the Commonwealth. See eg s 53(1) of the Ontario Conveyancing and Law of Property Act RSO 1990, c 34.

bank). This excludes the possibility that the originator's payment order initiates legal assignment. At the same time, an equitable assignment may be made more informally. However, "even so, not every mandate or authorization to pay money amounts to an equitable assignment".⁷

Support to the application of the assignment theory comes from the American case of *Delbrueck v Manufacturers Hanover Trust Co.*⁸ It was stated in this case⁹ that the originator's payment order to the originator's bank, ultimately followed by a payment order ("notice") given to the beneficiary's bank, constitutes an assignment of the funds either to the beneficiary's bank or to the beneficiary. While no assignment occurs in the absence of some form of communication to the assignee, such communication need not necessarily emanate from the assignor (originator) and is sufficient where it is given to the assignee's agent. The court thus bypassed the question as to whether the assignee is the beneficiary himself or his bank, the latter being treated either as the assignee or his agent.

Conversely, in *Libyan Arab Foreign Bank v Banker's Trust Co.*,¹⁰ Staughton J purported to reject this view altogether. Accordingly, he stated that "[a]n [interbank] account transfer means the process by which some other . . . institution comes to owe money to the [beneficiary] . . ., and the obligation [of the originator's bank to the originator] is extinguished or reduced *pro tanto*". Specifically rejecting "dicta in one American case", apparently referring to *Delbrueck*, he went on to note that in this context, "[t]ransfer may be a somewhat misleading word, since the original obligation is not assigned . . .; a new obligation by a new debtor is created".¹¹

Staughton J's view seems to be in line with the ultimate conclusion of Pennington, Hudson and Mann. Having thoroughly reviewed pertinent case law, they stated that "[i]t is . . . generally accepted that a mere mandate to pay does not constitute an equitable assignment of funds, whether the payee is notified of the mandate or not".¹²

Neither creating a trust nor initiating an assignment of funds, but rather, being a mere mandate to pay, the originator's payment order generates "a string of operations carried out by the different banks acting in a representative capacity".¹³ That is, the legal position of each participant is primarily determined under agency law. The leading case to that effect is *Royal Products Ltd v Midland Bank Ltd*.¹⁴

In the course of his judgment, Webster J specifically declined to treat the originator's instructions in an out-house transfer as "any separate or distinct contract of any kind". Rather, he regarded such instructions as "simply an authority and instruction, from a customer to its bank, to transfer an amount standing to the credit of the customer with that bank to the credit of [the beneficiary] with another bank". As such, the originator's instructions give rise

⁷ (n 3) 286.

⁸ 609 F 2d 1047 (2nd Cir 1979).

⁹ *ibid* 1051, alternative holding.

¹⁰ 1988 1 Ll Rep 259 (QB).

¹¹ *ibid* 273.

¹² (n 3) 589.

¹³ Ellinger *Modern Banking Law* (1987) 367–368.

¹⁴ 1981 2 Ll Rep 194 (QB)

to “an ordinary banking operation”, namely “of a kind which is often carried out internally”.¹⁵

Stated otherwise, the payment order is a mandate. In carrying it out, the originator’s bank acts as the originator’s agent. As such, the originator’s bank owes the originator “a duty to use reasonable care and skill”. It is not absolutely responsible for completing the credit transfer. Rather, in case of noncompletion, delayed completion or miscompletion, the originator’s bank is liable to the originator for damages arising from the breach of the above-mentioned duty.

As the originator’s agent, the originator’s bank “would be vicariously liable for the breach of that duty by any servant or agent to whom [it] delegated the carrying out the instructions”.¹⁶ Accordingly, the originator’s bank is liable to the originator for the intermediary bank’s negligence. In that respect, there is no difference in the responsibility of the originator’s bank for the negligence of a branch (that is, of the servants or employees of the originator’s bank) on one hand, and for the negligence of a correspondent bank (namely, of its agent).

Webster J specifically rejected the application of the strict compliance doctrine, emanating from the law of letters of credit, to the standard of compliance required from the originator’s bank as agent. Rather, the required standard is that of a duty of care. This means that in complying with the originator’s instructions the originator’s bank “[is] required [possibly through the use of a correspondent bank, its agent] to make funds available to [the beneficiary’s bank] *in one way or another* . . . and to notify [the beneficiary’s bank] that the sum [is] to be credited to the account of [the beneficiary]”.¹⁷ That is, the originator’s instructions must be carried out “with reasonable care and skill”.¹⁸ It is however submitted that “strict compliance” ought to be regarded as the required standard for the duty of the originator’s bank to issue onwards a corresponding payment order matching that of the originator.¹⁹

In the United States, prior to Article 4A, *Walker v Texas Commerce Bank*²⁰ stated that in receiving a payment order from a sender, a receiving bank is under a duty “to implement commercially reasonable internal procedures designed to process [a payment order] in accordance with [the sender’s] instructions, to verify the accuracy of, and compliance with, instructions, to detect and minimize inaccuracy, and to act diligently to remedy errors”.²¹ This is quite in line with the receiving bank’s “duty to use reasonable care and skill” in carrying out a payment order set out in *Royal Products*.²² More specifically, *Walker* provides a rationale underlying cases allocating the risk of erroneous execution of payment orders to the erring bank. This applies to the erroneous issue of a duplicate payment order,²³ a payment order containing a higher amount than instructed,²⁴ or a payment order designating an unintended

¹⁵ *ibid* 198.

¹⁶ (n 14) 198.

¹⁷ *ibid* 199, emphasis added.

¹⁸ *ibid*.

¹⁹ See *Clansmen Resources Ltd v TD Bank* (19 Dec 1988), 86/00047 (BCSC), affirmed on other grounds (1990), 43 BCLR (2d) 273 (CA).

²⁰ 635 F Supp 678 (SD Tex 1986).

²¹ *ibid* 682.

²² (n 14) 198.

²³ *Morgan Guaranty Trust Co v Outerbridge* (1990) 72 OR (2d) 161 (HCJ).

²⁴ *Australia & New Zealand Banking Group v Westpac Banking Group* (1978) 78 ALR 157 (Aust HC).

beneficiary.²⁵ In such cases, the erring bank is left with an action in restitution against the overpaid or wrongly paid beneficiary or its bank.

Furthermore, *Walker*, as a derivative of *Royal Products*, appears to underly also *Royal Bank of Canada v Stangl*.²⁶ In the latter case, a beneficiary's bank was held liable to its sender (an intermediary bank) in negligence for the failure to clarify the contents of a payment order instructing payment to an account that did not belong to the named beneficiary.²⁷

On its part, the intermediary bank owes "no duty of any kind direct to [the originator]". While the originator's bank is entitled to carry out the originator's instructions by using the services of a correspondent bank, the originator typically gives the originator's bank "no authority which would have . . . the effect of creating privity of contract between the [originator] and [the intermediary bank]".²⁸ Stated, otherwise, in the absence of privity of contract between the originator as principal and the intermediary bank as subagent, the latter owes no duty to the former and thus is not liable to it for damages generated by its negligence.²⁹ Rather, acting as an agent for the originator's bank, the intermediary bank's duty of care is owed to its principal, the originator's bank. In turn, as already indicated, the originator's bank is vicariously liable to the originator for damages arising from the intermediary bank's negligent acts or omissions.

Prior to Article 4A, American common law, contrary to the common law of England, allowed the originator to recover directly from a defaulting intermediary³⁰ or beneficiary's bank.³¹ Recovery was allowed on the basis of agency, negligence, or a third party beneficiary theory.

(b) Revocability

In principle, as the originator's agent, the originator's bank must comply with the originator's countermand of payment, which effectively terminates the mandate created by the (now countermanded) payment order. In an in-house credit transfer, the revocation instruction must reach the bank before it acted on the payment order, that is, prior to the payment into the beneficiary's account.³² Otherwise, in an out-house transfer, the originator's revocation right comes to an end when the beneficiary's bank has received the payment order instructing payment to the beneficiary together with cover.³³ Neither payment nor advice to the beneficiary is required. Arguably, however, the revocation right comes to an end also where the beneficiary's bank binds itself to the beneficiary before receipt of cover.

²⁵ *Clansmen Resources Ltd v Toronto Dominion Bank* (1990) 43 BCLR (2d) 273 (CA).

²⁶ (1992) 32 ACWS (3d) 17 (Ont Ct Gen Div) [092/066/089-19].

²⁷ For a critical case comment, see Geva "Ambiguous wire instructions: *Royal Bank of Canada v Stangl*" 1994-95 *Can Bus LJ* 435.

²⁸ (n 14) 198.

²⁹ However, this view may not be universally shared. Thus Powell *The Law of Agency* (1961) 309 concludes that "[i]n the present state of authorities it cannot be said with certainty that the sub-agent would never be liable to [the principal] for negligence". It is possible that liability in negligence will be fastened "where the sub-agent [is] a person who profes[s] a particular skill".

³⁰ See eg *Evra v Swiss Bank* 522 F Supp 820 (ND Ill 1981), reversed on other grounds, 673 F 2d 951 (7th Cir 1982).

³¹ See eg *Securities Fund Ser Inc v Am Nat'l bank & Trust Co* 542 F Supp 323 (ND Ill 1982).

³² *Gibson v Minet* (1824) 2 Bing 7 130 ER 206.

³³ See *Royal Products* case (n 14) 198-199.

Presumably, in an out-house transfer, where the originator has no privity with any receiving bank other than his own, revocation instructions must be communicated by the originator to his bank. The originator's bank must then transmit the revocation instructions onward through the chain of participating banks, all the way up to the beneficiary's bank where they must reach prior to the above-mentioned cutoff point.

In connection with interbank payment orders transmitted over a funds transfer system, irrevocability may be forwarded by participating banks to the point of the release of the payment order by the sending bank. This may be established by a funds transfer system rule.³⁴ In the absence of such a rule, irrevocability upon release may be inferred on the basis of the nature of the system and pertinent banking practices.³⁵ Obviously, irrevocability upon release is tantamount to no revocability.

(c) Discharge

Payment between the originator and the beneficiary is completed so as to discharge the former's debt to the latter where the beneficiary obtains, vis-à-vis the beneficiary's bank, "the unconditional right to the immediate use of funds transferred".³⁶ In this context, "unconditional" was broadly construed by the House of Lords to mean "unfettered and unrestricted" and not merely "neither subject to the fulfilment of a condition precedent nor defeasible on failure to fulfil a condition subsequent".³⁷ Prior to crediting the beneficiary's account with the amount of the payment order,³⁸ a beneficiary's bank may become unconditionally liable to the beneficiary upon receiving cover for the payment order, deciding to credit the beneficiary's account, or upon credit risk assumption, actual or presumed, on the basis of either availability of cover or explicit assumption of risk in anticipation for its impending arrival.³⁹

(ii) UCC Article 4A

(a) Introduction

In the United States, pre-Article 4A law governing credit transfers was described as "a poorly developed framework of legal rules".⁴⁰ In the prefatory note, the drafters explained the need for Article 4A on the basis of the absence of a "comprehensive body of law that defines the rights and obligations that arise from wire transfers". Article 4A of the Uniform Commercial Code was designed to meet this inadequacy and "provide a comprehensive body of law that we do not have today". It is now in force in most, including all major,

³⁴ In the UK this is so provided under the CHAPS Rules. According to Rule 2, a CHAPS payment order must command "an *irrevocably* guaranteed unconditional sterling payment for same day settlement" (emphasis added).

³⁵ See eg *Delbrueck* case above (n 8) 1051 (with respect to CHIPS before CHIPS Rules were revised to state irrevocability expressly in current Rule 2).

³⁶ *The Brimnes, Tenax Steamship Co Ltd v The Brimnes (Owners)* 1973 1 All ER 769 782, per Brandor J (QBD), affirmed 1974 3 All ER 88 (CA).

³⁷ *A/S Awilco v Fulvia SpA Di Navigazione, (The "Chikuma")* 1981 Ll Rep 371, 375, per Lord Bridge (HL).

³⁸ That is, crediting the collected funds balance of the beneficiary.

³⁹ For detailed analysis of case law, see Geva "Payment into a bank account" 1990 *JIBL* 108.

⁴⁰ Scott "Corporate wire transfers and the uniform new payment code" 1983 *Colum L Rev* 1664.

American jurisdictions. It was specifically adopted by the two LVTS' in the United States, Fedwire and CHIPS, as the law governing a credit transfer that passes through each of these networks. UCC Article 4A strongly influenced the Model Law on International Credit Transfers, prepared by UNCITRAL for consideration for adoption by United Nations member states as national legislation.⁴¹

The transaction covered by Article 4A is a nonconsumer credit transfer, called a "funds transfer".⁴² The typical transaction is high speed (usually sameday) large value credit transfer between sophisticated business or financial organizations. Another characteristic is low cost in relation to the value of the payment.⁴³ Finally, high speed automated processing is usually assumed.⁴⁴

A "funds transfer" governed by UCC Article 4A consists of a series of transactions, beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order.⁴⁵ A "payment order" means an instruction of a sender to a receiving bank, transmitted orally, in writing, or electronically (whether online or offline), to pay, or cause another bank to pay a fixed or determined amount of money to a beneficiary.⁴⁶ Accordingly, for each payment order, the parties are the sender and the receiving bank. In connection with a complex account transfer, the parties to a funds transfer are the originator, the originator's bank, one or more intermediary banks, the beneficiary's bank and the beneficiary.

An interbank payment order may be transmitted over a "funds-transfer system", that is, a communication network of a clearing house or another association of banks.⁴⁷ The domestic LVTS for each country, such as CHIPS and Fedwire in the United States, as well as the international SWIFT network, is such a "funds-transfer system". To some extent, a rule adopted by a funds-transfer system ("funds-transfer system rule"), and to a lesser extent, even a bilateral agreement, may supersede the provisions of Article 4A.⁴⁸

Unless displaced by a bilateral agreement or a funds-transfer system rule, the law applicable to each payment order is that of the jurisdiction in which the receiving bank is located. Similarly, the law of the jurisdiction in which the beneficiary's bank is located governs the relationship between the beneficiary's bank and the beneficiary, as well as the discharge of the originator's debt to the beneficiary. A funds-transfer system rule, displacing any of the above, binds *all* participants to a *funds transfer* having notice that the funds-transfer system might be used in the funds transfer and of the choice of law made by the system. As indicated, both CHIPS and Fedwire effectively selected Article 4A

⁴¹ See Resolution 47/34 adopted by the UN General Assembly on Nov 25, 1992, encouraging UN member states to consider enacting the Model Law as national legislation. The full text of the Model Law is annexed to the Report of the United Nations Commission on International Trade Law, 25th Sess UN Doc A/47/17. For the recognizable influence of UCC Article 4A on the Model Law, see Crawford "International credit transfers: the influence of Article 4A on the Model Law" 1991 *Can Bus LJ* 166.

⁴² UCC § 4A-104 and 108. The Model Law calls the transaction (Article 2(a)) "credit transfer".

⁴³ See Prefatory Note to Article 4A.

⁴⁴ See eg UCC § 4A-207(b)(1) and Official Comment 2.

⁴⁵ UCC § 4A-104(a). Pertinent terms are defined in §§ 4A 103 to 105.

⁴⁶ UCC § 4A-103(a)(1).

⁴⁷ UCC § 4A-105(a)(5).

⁴⁸ UCC § 4A-501. Federal Reserve regulation and operating circular supersede inconsistent provisions of Article 4A under UCC 4A-107.

as the governing law. However, in principle and unless displaced by a funds transfer system rule the applicable law is determined under Article 4A by reference to each individual bilateral relationship (that is, sender-receiving bank, beneficiary's bank-beneficiary, and originator-beneficiary) and not the entire funds transfer as a whole.⁴⁹

(b) The payment order

A payment order is a request by the sender to the receiving bank which can be accepted or rejected. It does not create agency or mandate. Nor is it tantamount to the assignment of funds; rather, acceptance by a receiving bank of a sender's payment order generates a contract *sui generis* that does not fall into any established relationship. A receiving bank is neither an agent (of the sender, beneficiary or of any other participant) nor an assignee (of the originator's funds at the originator's bank). Acceptance inures solely to the benefit of an immediate party in privity. Thus, acceptance by a receiving bank other than the beneficiary's bank inures to the benefit of the sender; acceptance by the beneficiary's bank inures to the benefit of the beneficiary.⁵⁰

Acceptance of a payment order by the beneficiary's bank is either by paying (or advising) the beneficiary, or where the beneficiary has an account at the beneficiary's bank, also by obtaining cover for such a payment.⁵¹ Acceptance by a receiving bank other than the beneficiary's bank is by the *execution* of the payment order, that is, by the issue of a corresponding payment order, intended to carry out the one received by the bank.⁵² The executing bank must issue a payment order that strictly conforms to that received by it with respect to the amount, the ultimate destination of the funds, and the identity of any specifically designated intermediary bank. Otherwise, the executing bank's duties as to speed, the means of communication, the use of a funds-transfer system, and the selection of an intermediary bank where none is designated by the sender, are to be carried out with reasonable care and skill.⁵³ Nothing short of "execution" serves as acceptance by a receiving bank other than that of the beneficiary. Stated otherwise, giving notice of acceptance, obtaining cover for the payment order or incurring an obligation to accept, will not serve as acceptance by a nonbeneficiary's bank.⁵⁴ An effective obligation to accept must be solely by express agreement but by itself is not acceptance.⁵⁵

⁴⁹ Choice of law is governed by UCC § 4A-507. In the Model Law, the conflict of laws provision is optional. It does not deal with the effect of a funds-transfer system rule.

⁵⁰ See in general UCC § 4A-212 (and Official Comment) as well as 4A-209 Official Comment 1.

⁵¹ Under Article 9(1) of the Model Law, acceptance by the beneficiary's bank is constituted also (i) upon receipt of the payment order (but only if so agreed with the sender) or (ii) by giving notice to the sender.

⁵² UCC § 4A-209 and 301.

⁵³ UCC § 4A-302.

⁵⁴ In this respect, the Model Law is different. Under Article 7, acceptance by a receiving bank other than the beneficiary's bank may occur not only by execution, but also (i) upon receipt of the payment order by the receiving bank (but only if so agreed), (ii) by giving notice of acceptance to the sender, (iii) by debiting the sender's account or (iv) automatically after the expiry of the rejection period (usually on the second banking day following the receipt of the payment order) provided no notice of rejection had been given (but only where sender's funds are available and sender information in the payment order is adequate).

⁵⁵ UCC § 4A-212.

An unaccepted payment order expires after five days,⁵⁶ but may anyway be rejected even earlier, at the receiving bank's discretion. Notice of rejection is required to avoid liability for interest. In one case, notice of rejection precludes acceptance by a beneficiary's bank holding adequate funds as cover.⁵⁷ Otherwise, there is no acceptance by inaction or mere passage of time. Suspension of payment by a receiving bank is tantamount to rejection by operation of law. In general, the occurrence of either acceptance or rejection is irreversible.⁵⁸ No duty is fastened on a bank that has neither accepted nor rejected a payment order.⁵⁹

Acceptance of a payment order by a receiving bank obliges the sender to pay the amount of the order.⁶⁰ Sender's payment is carried out usually by means⁶¹ of

- (i) an interbank final settlement over a funds-transfer system;
- (ii) a credit by the sending bank to the receiving bank's account, in which case payment occurs at midnight of the day on which the credit is withdrawable and the receiving bank learns of this fact, unless credit was withdrawn earlier, in which case payment occurred at the time of withdrawal;⁶² or
- (iii) a debit by the receiving bank to the sender's account, provided funds are actually available in the account.

Where the receiving bank is that of the beneficiary, payment by means of a debit to the sender's account containing adequate cover, in fact, even by means of the availability of cover for a debit in such an account, will constitute acceptance only at the opening of the next funds-transfer system day, provided the payment order was not rejected until one hour thereafter.⁶³

A payment order is cancelled by operation of law if it remains unaccepted for five days, as well as where the receiving bank knows of the sender's death or legal incapacity before acceptance. Otherwise, a payment order can be cancelled or amended by means of a communication of the sender to his receiving bank. Cancellation or amendment can be made by the sender unilaterally up to the time of acceptance by the receiving bank. After

⁵⁶ UCC § 4A-211(d).

⁵⁷ See text at n 63 below.

⁵⁸ Rejection of payment order is governed by UCC § 4A-211.

⁵⁹ Conversely, the Model Law imposes on a receiving bank that has not rejected a payment order, assistance, inquiry and notice obligation, even in the absence of acceptance on its part. See eg Articles 8, 10 and 13.

⁶⁰ UCC § 4A-402.

⁶¹ Payment by sender to receiving bank is governed by UCC § 4A-403. For the beneficiary's bank, sender's payment may constitute acceptance, at times governed by § 4A-209(b). See text at n 63 below.

⁶² Conversely, under Article 6(b) of the Model Law, sending bank's payment of payment order by crediting the receiving bank's account occurs when this credit is used or, if not used, on the banking day *following* the day on which the credit is available for use to the knowledge of the receiving bank (rather than at midnight of the day on which the credit is withdrawable as under Article 4A).

⁶³ UCC § 4A-209(b)(3). Conversely, under Article 9(1)(c) of the Model Law, acceptance of the beneficiary's bank by means of debiting the sender's account occurs when the beneficiary's bank actually debits the account. Under Article 9(1)(h), automatic acceptance by the mere availability of sender's funds (without actually debiting the sender's account) takes place on the second banking day following the receipt of the payment order (containing sufficient information to identify the sender) unless notice of rejection was given prior to that.

acceptance, and in the absence of an agreement or a funds-transfer system rule to the contrary, cancellation or amendment requires the agreement of the receiving bank. Where a receiving bank other than that of the beneficiary agrees to the cancellation or amendment, a conforming cancellation or amendment must be issued by it to its own receiving bank.⁶⁴ The funds transfer is thus effectively aborted if the last receiving bank to receive a payment order is advised by its sender of the cancellation or amendment prior to the acceptance of the payment order by that receiving bank.

Where the receiving bank is the beneficiary's bank, post-acceptance cancellation or amendment can be made only with respect to an unauthorized or mistaken funds transfer. As with respect to any post-acceptance cancellation or amendment, agreement of the receiving bank, in this case the beneficiary's bank, is required.

Unless otherwise provided by an agreement or funds-transfer system rule, the sender is liable to a receiving bank for any loss incurred by that bank in a post-acceptance cancellation (or amendment) or attempted cancellation (or amendment).⁶⁵

Injunction and creditor process by the originator's creditors can prevent the originator's bank from initiating a funds transfer. Likewise, an injunction and creditor process by the beneficiary's process can prevent the beneficiary from receiving the benefit of payment once the funds transfer has been completed. A funds transfer cannot however, be intercepted by third parties between acceptance by the originator's bank and by the beneficiary's bank.⁶⁶

(c) Completion, discharge and revocation

A funds transfer is completed "by acceptance by the beneficiary's bank of a payment order for the benefit of the originator's payment order".⁶⁷ Acceptance by the beneficiary's bank further constitutes payment by the originator to the beneficiary, namely a discharge of the originator's obligation on the underlying transaction, that is, of the debt paid by means of the funds transfer.⁶⁸ Finally, as indicated, acceptance by the beneficiary's bank is by making payment to the beneficiary or by advising the beneficiary of the receipt of the payment order (or that the account of the beneficiary has been credited with respect to the order). For a beneficiary holding an account at a beneficiary's bank, which is obviously the usual case, acceptance by the beneficiary's bank is also by receiving payment from its sender.⁶⁹ Acceptance (in fact, otherwise than by payment to the beneficiary) generates an obligation by the beneficiary's bank to pay the beneficiary.⁷⁰

⁶⁴ UCC § 4A-211.

⁶⁵ *ibid.*

⁶⁶ § 4A-502 and 503.

⁶⁷ § 4A-104(a).

⁶⁸ § 4A-406.

⁶⁹ § 4A-209(b) and (c). For the Model Law variation see n 51 above.

⁷⁰ § 4A-404. No corresponding rule is provided for in the Model Law. UCC 4A-404 further requires the beneficiary's bank (at the risk of incurring liability for interest and possibly reasonable attorney's fees) to advise the beneficiary of a payment order instructing payment to the beneficiary's account before midnight of the next funds-transfer business day following the payment date (the latter being usually the day the order is received by the beneficiary's bank).

III *Suspension of payment by an intermediary bank*

In principle, a sender is liable to a receiving bank for the amount of an accepted payment order. Accordingly, UCC § 4A-402 provides that the acceptance of a payment order by a receiving bank entitles the accepting bank to receive payment from the sender.

This rule is compromised under Article 4A in connection with erroneous payment orders (governed by § 4A-205), payment orders misdescribing the beneficiary (governed by § 4A-207), as well as erroneous (or nonconforming) execution (governed by § 4A-303). It is further superseded where the funds transfer is aborted, namely not completed, due to the suspension of payment by the intermediary bank (causing the receiving bank not to execute the payment order received from such an insolvent sender).

Under what came to be known as the “money-back guarantee” rule of Article 4A,⁷¹ payment by the sender is excused, or can be refunded to him, where the funds transfer is not completed. Nonetheless, an originator that selected a failed intermediary bank is responsible for the amount prepaid by the sender to that bank. Otherwise, where loss occurred at an intermediary bank, the effect of the “money-back guarantee” rule is to shift the risk of loss away from the originator and to place it on the sender to the insolvent bank, regardless of whether loss was caused by a breach of duty.

No similar “money-back guarantee” exists under the common law. As indicated, at common law, the liability of the originator’s bank to the originator is not absolute. Rather, it either depends on negligence in choosing the failed intermediary, or is vicarious, for the negligence of either the failed intermediary or of its sender in selecting that intermediary.

IV *Unauthorized and unintended payment orders*

A payment order that reached a receiving bank might not have been sent by the purported sender or on his behalf. Alternatively, particularly in an electronic environment, a payment order may be issued by the sender containing different instructions from those intended. Finally, before its arrival at the receiving bank, the text of a payment order may be altered in the course of its transmission through a communication system. While the first case is of an unauthorized payment order, the two others involve unintended payment orders.

In principle, a person is responsible for an authorized payment order sent by himself or on his behalf. Stated otherwise, the starting point is that one is not responsible for an unauthorized order but is fully responsible for an authorized one regardless of any mistake or discrepancy in its content. This well established and fully logical principle is further refined and occasionally defied by UCC Article 4A.

(i) Unauthorized orders

Under Article 4A, the customer is liable to the receiving bank for the amount of any authorized payment order for which the customer is bound under the law of agency. Authority could be express, implied or apparent. (*Quaere* as to

⁷¹ See UCC § 4A-402 Official Comment 2.

whether estoppel, by negligence or conduct, from denying authority, is included.) The customer is also liable for the amount of any payment order, including an unauthorized one, whose authenticity was verified by the bank pursuant to a commercially reasonable security procedure agreed upon between the customer and the bank. A security procedure may require the use of algorithms or other codes, identifying words or numbers, encryption or call back procedures (but may not be constituted by a mere comparison between a signature and an authorized specimen signature). A verified payment order should not be beyond the scope of any written agreement between the bank and the customer or instruction of the customer, restricting acceptance of payment orders issued in the name of the customer. However, an unauthorized order does not bind the customer notwithstanding its proper verification where the customer and the bank agreed to allocate the loss, in whole or in part, to the bank, or where the customer proves that the order was not caused by a person other than an interloper.⁷²

The entire scheme can be described as follows: The risk of an unauthorized payment order falls initially on the bank. Such risk shifts to the customer if the bank proves its own compliance with an agreed-upon commercially reasonable security procedure. The risk shifts back to the bank where the loss is proved by the customer to be caused by an interloper or is allocated to the bank by agreement.

Having paid for a payment order, however, the customer is precluded from asserting lack of authority or lack of verification, unless he notifies the bank of any objection within one year from being advised by the bank of the payment order.⁷³

A receiving bank that paid a payment order for which the customer is not responsible is liable for interest subject to the customer's duty to notify "within a reasonable time not exceeding 90 days" after being advised of the transfer.⁷⁴

(ii) Unintended payment order

In an electronic environment, typically errors in a payment order include the transmittal of a duplicate payment order, an increase in the amount of a payment order (for example, by the addition of zeros to the sum) or the instruction of payment to an unintended beneficiary (usually by erring in the account or identification number of the intended beneficiary). Article 4A provides for the allocation of responsibility for such errors.

In principle, the sender is responsible for the contents of his own payment

⁷² UCC § 4A-201 to 203. According to § 4A-202(c), commercial reasonableness of a security procedure is a question of law to be determined by considering the wishes of the customer expressed to the bank, the circumstances of the customer known to the bank (including the size, type and frequency of payment orders normally issued by the customer to the bank), alternative security procedures offered to the customer and security procedures in general use by customers and receiving banks similarly situated. A security procedure is deemed to be commercially reasonable if (i) the security procedure was chosen by the customer after the bank offered and the customer refused a security procedure that was commercially reasonable for the customer, and (ii) the customer expressly agreed in writing to be bound by any payment order, whether or not authorized, issued in its name and accepted by the bank in compliance with the security procedure chosen by the customer.

⁷³ UCC § 4A-505.

⁷⁴ § 4A-204.

order. He is also responsible for a discrepancy arising in the course of the transmittal of a payment order through a third party communication system (eg SWIFT). This means that such an intermediary system is deemed to be an agent of the sender who is bound by the contents of the payment order as sent to the receiving bank by that communication system.⁷⁵

A sender can nevertheless shift the loss arising from the transmittal of an erroneous payment order (whether by itself or by a communication system acting as his agent) where the receiving bank has failed to comply with an *agreed-upon* security procedure which would have detected the error. Such a procedure may require a unique code for each payment order (so as to alert the receiving bank in case of a duplicate payment), different codes for different levels of amounts or identify regular beneficiaries.⁷⁶ In order to benefit the sender, the security procedure, with which the receiving bank failed to comply, must have been agreed upon in advance.

Recovery of an erroneous payment resulting from an erroneous payment order⁷⁷ can be made, but only to the extent allowed under the law of mistake and restitution.⁷⁸ Such recovery is available to the erring bank only directly from the actual beneficiary, irrespective whether the two are in privity. A sender notified of an erroneous payment order who negligently failed to report the error “within a reasonable time, not exceeding 90 days” of being advised, cannot shift the loss to the receiving bank which did not comply with the agreed upon security procedures.⁷⁹

[to be concluded]

⁷⁵ § 4A-206.

⁷⁶ § 4A-205.

⁷⁷ § 4A-205(a).

⁷⁸ For this remedy see more in the ensuing discussion on nonconforming execution.

⁷⁹ UCC § 4A-205(b).